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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 295

H. P. WELCH COMPANY, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

FILED AUGUST 22, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1938.

[fol. 1] **IN SUPREME COURT OF NEW HAMPSHIRE**

1938 Term

H. P. Welch Company, Appellant,

v.

The State of New Hampshire, Appellee

Agreed Summary of Proceedings

The Public Service Commission of The State of New Hampshire on April 13, 1937 issued to the appellant, H. P. Welch Company, an order to show cause "why its common and contract carrier certificates should not be suspended or revoked by reason of alleged violations of the Laws of 1933, c. 106, s. 8." In accordance with the terms of the order, a hearing was thereafter held at Concord on May 10, 1937, at which the appellant appeared.

From the testimony at the hearing it appeared that the appellant is a corporation organized under the laws of Massachusetts, doing both an interstate and intrastate business as a common and contract carrier of freight by motor vehicle over public highways in Massachusetts and New Hampshire. The appellant as a common and contract carrier, pursuant to the provisions of Chapter 106, Laws of 1933, in 1937 registered twenty trucks with the Commission. The appellant has terminals at Boston in Massachu-
[fol. 2] setts, and at Manchester, Concord, and Claremont, in New Hampshire, and approximately ninety-nine per cent of its business is interstate. The hours of service records filed by employees of appellant showed in several instances of an elapsed time greater than twelve hours on duty. The records of Philip Chevrette indicated that his regular time to report for duty was from 7 to 7:30 A. M., but earlier and later calls were shown. Chevrette was principally engaged in operating a motor truck from Manchester into Boston, making a round trip each day. On January 11, 1937, his return showed that he was on duty from 3:15 A. M. to 8:40 P. M., except for a relief of forty-five minutes at Boston between 5:30 and 6:15 P. M. He reported for duty at 7:15 A. M. the following morning, January 12, but was released at 9:50 A. M. His returns also showed that on January 25

he was on duty from 7:20 A. M. to 11:45 A. M., and on January 26 from 1:15 A. M. until 6 P. M. No emergency was claimed in connection with these operations.

The returns showed similar instances of continuous employment in excess of twelve hours for Roland Rousseau operating a motor truck over a loop route out of Manchester by the way of Lawrence, Lowell and Nashua and [fol. 3] for A. Demers operating a motor truck from Manchester into Boston and return. The specific findings of the Commission that appellant's employees had operated trucks for longer periods than permitted by sect. 8, Ch. 106, Laws 1933 was warranted by the evidence. In all the operations in which the alleged violations occurred there were being carried on the trucks some interstate shipments, but it was the practice of the appellant to carry intrastate shipments on the same trucks.

The Commission by report and order filed as of December 11, 1937, held that the appellant had violated the provisions of the Laws of 1933, section 8, Ch. 106, and ordered that any and all registration certificates issued by the Commission to the appellant—"to lawfully transport property for hire in motor vehicles between points within this state either as a common or contract carrier be" suspended for a period of five days. The appellant thereupon seasonably moved for rehearing which was denied December 22, 1937. The appellant filed its appeal with the Supreme Court of New Hampshire, alleging among the grounds for the appeal, the following:

[fol. 4] "1. The statute prescribing maximum hours of labor (Sect. 8, Ch. 106, Laws 1933) upon which said report and order are based does not apply equally to all owners and drivers of motor vehicles operated for the transportation of property on the highways of this state. It applies only to owners and drivers operating motor vehicles for the transportation of property for hire and discriminates against them by imposing burdens and restrictions which are not applicable to other owners and operators of motor vehicles engaged in the transportation of property on the highways of this state. The statute denies to the H. P. Welch Company the equal protection of the laws guaranteed by the Bill of Rights and the Constitution of New Hampshire and by the Fourteenth Amendment to the Constitution of the United States and is of no force and effect.

"2. The alleged violations of said statute (Sect. 8, Ch. 106, Laws 1933) and of Rule 4n occurred while the said H. P. Welch Company and its employees were engaged in interstate commerce. The power to regulate interstate commerce is by the Constitution of the United States (Sect. 8, Art. 1) vested in the Congress, which has exercised this power as to motor carriers engaged in interstate commerce by the "Motor Carrier Act, 1935", which, with the regulations made pursuant thereto, supersedes said Ch. 106, as amended by Ch. 169, Laws of 1933, in so far as the provisions thereof might apply to interstate commerce."

The Supreme Court by opinion and order handed down June 7, 1938, dismissed the appeal. The motion for rehearing filed by the appellant was denied June 21, 1938.

Robert W. Upton, Attorney for Appellant. Dudley W. Orr, Attorney for Appellee.

Approved: John E. Allen, Chief Justice of the Supreme Court of New Hampshire.

[fol. 5] In Supreme Court of New Hampshire

Docket Entries

2966

Appeal of H. P. Welch Company from Public Service Commission

Robert W. Upton, for Welch Company.
Dudley W. Orr, Special Counsel for Public Service Commission.

Public Service Commission Appeal

Entered December 23, 1937

Dec. 24, 1937. Order of suspension sustained.
June 7, 1938. Woodbury, J., Appeal dismissed (opinion).
June 20, 1938. Motion for rehearing filed.
June 21, 1938. Motion denied.
July 14, 1938. Appeal to U. S. Supreme Court allowed.
July 29, 1938. Motion to dismiss by appellee filed.
A true copy. Attest:

George O. Shovan, Clerk of the New Hampshire Supreme Court.

[fol. 6] BEFORE PUBLIC SERVICE COMMISSION OF NEW HAMPSHIRE

D—T1837

H. P. WELCH COMPANY

Re Hours of Service Record

Common and contract carriers—Jurisdiction:

1. It appearing that the Federal authority extends to the safety of the employees in industry as well as to safeguard the transportation of passengers or goods in transit, the State would not be deprived of the power and authority to safeguard its citizens or their property engaged in no way in the furtherance of or the conduct of the carrier industry involved.

Common and contract carriers—Hours of Service Records —Constitutionality:

2. It appearing that the business of transporting property for hire is in effect engaging in the business of a public utility, such utility being the object of special regulations, certain rules were prescribed by the Commission covering Hours of Service Records.

Common and contract carriers—Violation of Act—Interpretation of statute:

3. Hours of Service Records covering operation over routes wholly within the State not having been filed, show violation of Rule of the Commission and of the orders making such rule effective; the interpretation of the statute being that a driver having been on duty 12 hours, even if in another State for all or a greater portion of that time, violates the law if he operates on the highways of one State, subsequent to the 12-hour tour of duty without a three or an eight hour rest period.

Common and contract carriers—Authority of Commission to prescribe rules:

4. The rules and regulations promulgated, not exceeding the authority granted by the statute, would appear to be a

reasonable means by which the Commission could carry out its duty of enforcing the Law, therefore, rules and regulations are reasonable methods by which the legislative purpose can be carried out.

Common and contract carriers—Hours of Service Record—Failure to comply with Laws of the State and requirements of the Commission—Revocation of certificates:

5. It appearing, after investigation, that a company operating trucks in the transportation of property for hire had violated the Laws of the State of New Hampshire and rules of the Commission with regard to Hours of Service Record, the certificates permitting said Company to operate as either a common or contract carrier were suspended for a period of five days.

[fol. 6-1] Appearances:

For the H. P. Welch Company, Robert Upton and Laurence Duncan.

For the State of New Hampshire, Dudley Orr.

REPORT—Filed December 11, 1937

SWAIN, Commissioner:

By order of the Commission dated April 13, the H. P. Welch Company was ordered to show cause why its common and contract carrier certificates should not be suspended or revoked by reason of alleged violations of the Laws of 1933, c. 106, s. 8, and of Rule 4n of Circular No. 2 of the Commission's Administrative Rulings. Hearing was held at Concord, May 10, 1937 and briefs were filed, all of which were received by June 30.

The law provides that:

"It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least

eight consecutive hours off duty. * * * Periods of release from duty herein required shall be given at such place and under such circumstances that rest and relaxation from the strain of the duties of the employment may be obtained. No period off duty shall be deemed to break the continuity of service unless it be for at least three consecutive hours at a place where there is opportunity for a rest. In case of an unforeseen emergency the driver or chauffeur may complete his run or tour of duty if such run or tour of duty, but for the delay caused by such emergency, would reasonably have been completed without a violation of this section. Provided, however, that the provisions of this section shall not apply to trucks while under the control of two licensed operators. The Commission shall have authority to enforce the provisions of this section."

[fol. 6-2] That portion of Rule 4n which is in issue reads:

"Each driver shall carry while on duty a record of his tour of duty on forms to be furnished by the Commission. Such record shall show the date and time at which the driver began and completed his tour of duty, and whether one or more licensed operators were on the vehicle at the same time for each day shown. Entries shall be made at the time such events occur, to cover calendar months. At the end of each month the record for each driver shall be forwarded to the Commission. A similar record shall be maintained at the home terminal by the carrier. The Commission may revoke the registration certificate of a carrier employing a driver without proper entries in such record."

This provision was made effective by Order No. 2560 dated August 1, 1933 and Order No. 3101 dated July 11, 1936.

A number of Hours of Service records were introduced in evidence showing an elapsed time of greater than twelve hours on duty. The record of Phil Chevrette, 121 Alsace Street, Manchester is an example. Although the regular reporting time for duty appears to be from 7 A. M. to 7:30 A. M. occasional earlier and later calls to duty evidently are made. On January 11, 1937, time on duty began at 3:15 A. M. and ended at 8:40 P. M. The only release shown is for 45 minutes at Boston between 5:30 P. M. and 6:15 P. M. Chevrette reported as usual at 7:15 A. M. the next morning January 12, but was released at 9:50 A. M. pos-

sibly because of overtime duty on the 11th. No rest period of either three or eight hours is shown at Boston following the 12-hour tour of duty. No emergency report was submitted. Evidently there was a violation of the New Hampshire Law from the time the driver reached the State line until he was relieved at Manchester. Incidently the Massachusetts law appears to have been violated from 3:15 P. M. until Chevrette reached the State Line. A somewhat similar violation is shown on January 26 with a tour of duty from 1:15 A. M. until 6 P. M. although the short day preceded rather than followed the long tour of duty, as on the 25th Chevrette worked only from 7:20 A. M. to 11:45 A. M. [fol. 6-3] Chevrette's regular run is between Manchester and Boston.

Similar violations are shown for Roland Rousseau, 363 Spruce Street, Manchester, regularly operating a loop route, Manchester via Lawrence, Lowell, and Nashua, and for A. Demers, 156 Lake Avenue, Manchester, operating between Manchester and Boston.

Although the respondent registered 20 trucks with the Commission as common and contract carrier trucks, only a few Hours of Service Records have been filed with the Commission. Among the drivers failing to file records are Osgood, operating between Concord and Laconia with occasional trips to Plymouth, Hook, operating between Claremont and Sunapee, and Buzwell, operating between Claremont, Lebanon, and Hanover.

The evidence is conclusive that both the statute and the Commission's Rule 4n as made effective by orders previously referred to have been violated. The respondent had been notified as to the Law and the Rules, by general notices, letters and by conference, and in fact admits requesting drivers to fill in and file Hours of Service Records. As the drivers are paid on an hourly basis, the respondent has knowledge of hours worked in excess of 12.

The respondent does not deny that its drivers occasionally work in excess of 12 hours. Further, the respondent does not deny that the drivers employed violated Rule 4n by failing to file Hours of Service Records. Although responding to a show cause order, no attempt was made to rebut or explain the Hours of Service Records of the employees with claims of emergency operation or other information available to the Company.

On brief the respondent argues:

1. The Commission is without jurisdiction to enforce the Act as against the H. P. Welch Company because it is engaged in interstate commerce.

2. Provisions of the Law of 1933, Chapter 106 are discriminatory and the act unconstitutional.

[fol. 6-4] 3. The evidence does not establish violation of the act by the company.

4. The Rules and Regulations issued by the Commission are unauthorized by the statutes, the company certificates may not be revoked or suspended for violation of such rules, and the evidence does not establish violation by the company.

These matters will be considered as above set forth for the reply of the State thereto.

Jurisdiction

1 The evidence clearly shows that the H. P. Welch Company is engaged in both interstate and intrastate commerce. It is alleged by the Company that approximately 99% of the traffic handled is interstate and approximately 1% intrastate. The Company argues that following the enactment by Congress of the Motor Carrier Act, 1935, vesting jurisdiction in the Interstate Commission, the State Law became inoperative as to carriers engaged in interstate commerce. Section 204 (a) of the Federal statute provides:

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records. qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of

records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

It is to be noted that the Federal statute grants authority to fix the maximum hours of service of all employees. The State law does not attempt to fix the maximum hours of [fol. 6-5] service of any employee, but makes it unlawful to operate on the State's highways after a 12-hour period on duty. There is nothing in the State Law to prevent a driver working in a warehouse after a 12-hour tour of duty as only operation on the highway is restricted.

The purposes of the two provisions differ widely. Congress acted on that matter over which it clearly has authority—interstate commerce. The thing to be protected is that which is transported. The Federal Act does not mention highway safety generally, but restricts the provisions to safety of operation and equipment of vehicles engaged in interstate commerce. The State law is designed under the police powers of the State to protect the lives and property of all those who use its highways.

If the argument of the respondent is sound, then as the Federal statute provides for reasonable requirements as to "safety of operation and equipment" interstate carriers are now free to run without lights, brakes, etc., to run through red lights, ignore all local and State speed restrictions, pass cars on hills, and violate all other State laws and City and Town ordinances governing safety of operation and equipment. Here, also, although the Interstate Commerce Commission will be concerned with that which is to be transported interstate, the State is concerned with the safety of all those who use its highways. In support of its position respondent cites University Overland Express, Inc. v. Alsop, et al., (Conn.) 189 Alt. 458, where the Court said:

"But a state regulation in respect to a branch of interstate commerce covering the same ground as a rule lawfully prescribed by or under authority of Congress 'will cease to have any force whether formally abrogated or not.' And the regulations prescribed by or under authority of Congress 'will alone control'. Reid v. Colorado, 187, U. S. 137, 146; 23 S. Ct. 92, 96; 47 L. Ed. 108.

"To come in conflict with a law enacted by Congress or a regulation promulgated pursuant to it, the provisions of

a state law or regulation, to be superseded by it, need not necessarily be in opposition or repugnant thereto. 'When [fol. 6-6] Congress sees proper to act with respect to any particular branch of interstate or foreign commerce, State regulations in conflict therewith or acting upon the same subject are thereby superseded.' 5 R. C. L. p. 704. 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition.' Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 604, 35 S. Ct. 715, 717, 59 L. Ed. 1137, Ann. Cas. 1916D, 333. 'The elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme' (Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 435, 33 S. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203) 'and exclusive.' Missouri Pacific R. Co. v. Stroud, 267 U. S. 404, 408, 45 S. Ct. 243, 245, 79 L. Ed. 783; Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 101, 46 S. Ct. 279, 283, 70 L. Ed. 482.

"To have the effect of superseding a state statute or regulation, the federal law may either expressly cover the precise subject-matter or show a purpose to take legislative possession of the whole field. (12 C. J. p. 18). To the extent that Congress does occupy the field of legislation existing state legislation within the scope of such occupation is superseded and further legislation prevented. 'The test • • • is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control.' Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439, 446, 448, 35 S. Ct. 304, 306 59 L. Ed. 661. 'Congress having entered this field of regulation it follows from the paramount character of its authority that state regulation of the subject-matter is excluded.' Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41, 36 S. Ct. 482, 484, 60 L. Ed. 874. 'In a case where • • • the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent, but only permissive power.' Chicago, R. I. & P. Ry.

Co. v. Hardwick Farmers' Elevator Co., supra, 226 U. S. 426, at p. 435, 33 S. Ct. 174, 176, 57 L. Ed. 284, 46 L. R. A. [fol. 6-7] (N. S.) 203; Adams Express Co. v. Croninger, 226 U. S. 491, 505, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Northern Pacific Ry. Co. v. Washington, 222 U. S. 370, 378, 32 S. Ct. 160, 56 L. Ed. 237; 12 C. J. p. 15."

The respondent further cites Northern Pacific Railway Company v. Washington, 222 U. S. 370; 56 L. Ed. 237 a case involving the hours of service of railway employees wherein the Supreme Court said:

"But we are of the opinion that this view is not compatable with the paramount authority of Congress over interstate commerce. It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce in a case like this exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state."

See also, Pennsylvania Railroad Company v. Public Service Commission, 250 U. S. 566; 63 L. Ed. 1142.

Respondent further argues that even though the Interstate Commerce Commission has not yet prescribed rules and regulations pursuant to the authority conferred upon it by the Motor Carrier Act yet the regulations of hours of labor is none the less removed from the jurisdiction of the State by that enactment and cites as authority, Missouri P. R. Co. v. Porter, 273 U. S. 341, 71 L. Ed. 672, Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 71 L. Ed. 432 and Oregon and Washington R. R. and N. Co. v. Washington, 270 U. S. 102; 70 L. Ed. 482. The respondent urges that in view of these decisions the Commission is without jurisdiction to revoke the certificates covering the intrastate operation of the H. P. Welch Company as such Company is also engaged in interstate Commerce.

[fol. 6-8] Although the State has not attempted to fix the hours of labor of employees but only restricts the operation

on the highways of the State of a driver who has been on duty 12 hours, by making such operation unlawful, the State in support of its position cites Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 34 S. Ct., 790, the Court said (page 793):

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In Reid v. Colorado, 187 U. S. 137, 148, 47 L. Ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harland, said: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243, 247. In Savage v. Jones, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said: 'When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to the regulation of Congress within the sphere of its delegated power (citing cases). But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to [fol. 6-9] circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.' (Citing many cases.)"

The State further points out that the Motor Carrier Act merely authorizes the Interstate Commerce Commission to establish reasonable requirements with respect to qualifications and maximum hours of service employees. The act does not in fact and of itself establish such reasonable requirements.

In the case of Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 S. Ct. 214, the Court said (Page 218):

"On the other hand, it is said that Congress has already acted,—has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

See also Southern R. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140; Atlantic Cl. R. Co. v. Georgia, 234 U. S. 280, 34 S. Ct., 829, and Missouri K. & T. R. Co. v. Harris, 234 U. S. 412, 34 S. Ct. 790.

[fol. 6-10] In Northern Pac. Ry. v. Washington, 222 U. S. 370; 56 L. Ed. 237; 32 S. Ct. 160 the statute to be construed in and of itself forbad hours of service on railway trains in excess of 16 hours in any 24. No such express regulation is contained in the Motor Carrier Act, 1935. Further, railroads operate their trains over rights of way owned by them. All motor carriers operate over highways owned by the

State and built and maintained from taxes contributed by its citizens.

In many cases the United States Supreme Court has held a variety of State regulations, similar to the one now under attack, to be constitutional. Registration of vehicles and licensing of operators, Hendrick v. Maryland, 235 U. S. 610; 59 L. Ed. 385; 35 S. Ct. 140. The requirement of an appointment of an agent for service of process in actions arising out of the use of the highways, Kane v. New Jersey, 242 U. S. 160; 61 L. Ed. 222; 37 S. Ct. 30; Hess v. Pawloski, 274 U. S. 352; 71 L. Ed. 1091; 47 S. Ct. 632. Uniform regulations limiting weights and dimensions of vehicles, Morris v. Duby, 274 U. S. 135; 71 L. Ed. 966; 47 S. Ct. 548; Sproles v. Binford, 286 U. S. 374; 76 L. Ed. 1167; 52 S. Ct. 581. Requirements of a bond or insurance to secure the public against loss from personal injuries or property damage, Hicklin v. Coney, 290 U. S. 169; 78 L. Ed. 247; 54 S. Ct. 142; Sprout v. South Bend, 277 U. S. 163; 72 L. Ed. 833; 48 S. Ct. 502.

The State further argues that for the purpose of protecting State property, State legislation will be valid as against the commerce clause that might otherwise be unconstitutional, Geer v. Conn., 161 U. S. 519; 40 L. Ed. 793; 16 S. Ct. 600; New York v. Hesterberg, 211 U. S. 31; 53 L. Ed. 75; 29 S. Ct. 10.

Continuing, the State argues:

"The point need not be labored that the interest of the state in its highways is one of the first importance. The enormous sums spent annually for the construction and maintenance of them are matters of common knowledge. [fol. 6-11] The ever increasing burden of traffic over them with its concomitant effect on the health and welfare of the citizens of the state is a subject of constant discussion. If the power of the legislature of the State of New Hampshire has been confined within the narrow limits that respondent claims then the sovereignty of the state over one of the most important aspects of our lives has disappeared and the power of regulating our affairs resides only in a remote and omnipotent federal government. If Congress may regulate the hours of service and qualifications of drivers it may also regulate the manner and method of operation by interstate carriers. If the Interstate Commerce Commission should adopt a rule that henceforth interstate carriers should bear

to the left, of necessity all intrastate motor traffic would follow suit. The federal statute now before the commission does not produce this outrageous consequence. A much more forthright declaration of congressional intent should be necessary to warrant this abrupt curtailment of state sovereignty.

"In view of the state interest in the protection of state owned highways from abuse, any conflict between state and federal legislation must be clear, direct and positive to require application of the rule that congressional action governing interstate commerce will supersede state regulations in the same field."

See Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412; 34 S. Ct. 790.

Whether or not these acts can be reconciled is not for this Commission to determine. The Motor Carrier Act, 1935 clearly recognizes the interests of the states in the matter of motor vehicle regulation. Under it many questions are to be decided in the first instance by Joint Boards composed of a representative from each State through which the interstate carrier operates. Section 221 of the act dealing with Orders, Notices, and Service of Process further carries out the theory of cooperation between the Federal and the State authorities. Under the declaration of policy and delegation of jurisdiction as contained in the Motor Carrier Act, 1935, [fol. 6-12] there is evidence that Congress sought to avoid conflicts of State and Federal authority. Section 202 (c) reads:

"(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Although we have discussed at length the contentions of the respondent and the State, we have no authority to consider as controlling to this Commission the conflicting question of jurisdiction. We are authorized by the legislature to suspend or revoke the certificates under which either an intrastate or interstate carrier may lawfully transport intrastate commerce for violation of the hours of service pro-

visions of Chapter 106. This we propose to do unless prevented by proper authorities. The suspension or revocation of authority to do intrastate business of carriers who are also interstate carriers for violations of the State law may have the effect of providing two sets of carriers operating on the highway, those doing solely an interstate business and those doing solely an intrastate business. Generally speaking, the routes covered by interstate carriers in the State are also covered by intrastate carriers so that there is available to shippers of intrastate traffic, service even though the interstate carriers discontinue handling intrastate commerce. This intrastate commerce is incidental business for the interstate carriers where authorized to handle such commerce, and is presumably handled at little added expense.

If, as respondent claims, the fact that a carrier is an interstate carrier ousts the State of jurisdiction as to all regulation of such carriers, even as to the intrastate commerce handled by such carrier, then it would appear necessary that the States refuse to authorize intrastate rights to any carrier also engaged in interstate commerce, in order that [fol. 6-13] the State regulations may be effective. Contrary to the rail situation as to the volume of interstate traffic versus intrastate traffic, intrastate motor vehicle traffic is conceded to exceed the interstate traffic.

In our opinion it is evident that the Federal authority extends to the safety of the employees in the industry as well as safeguarding the transportation of passengers or goods in transit. This does not deprive the State of the power and authority to safeguard its citizens or their property engaged in no way in the furtherance of or the conduct of the carrier industry here involved. If this position is false then all State regulations looking to the protection of highway travelers and their property are of no avail. In this respect railroad crossing protection and like regulations must fall by the wayside as in conflict with Federal authority exercised over Railroad operation.

Furthermore, as before stated, neither at the time of the violation, nor when the hearing was held, had the Interstate Commerce Commission in fact acted under the grant of authority to prescribe rules regulating hours of service, nor has it done so at the present time despite the passage of more than two years, since the enactment of the statute.

Thus we are confronted by an argument which, in this respect and under the circumstances, relies upon an unutilized Federal statute intended to provide control as the basis for securing not only relief from the police power of the State, but also, in fact from all regulations in the field. This in our opinion would produce an absurd result.

Constitutionality

2. The respondent argues that the provisions of Chapter 106 are discriminatory and that hence the Act is unconstitutional. The Company claims, in effect, that the selection of carriers for hire to which the hours of service regulations apply results in a classification for purposes of regulation which is unreasonable. It cites the Opinion of the Justices, 85 N. H. 564:

[fol. 6-14] "Classification to be valid must reasonably promote some proper object of public welfare or interest and may not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature."

The Company points to the fact that firms or corporations transporting products of their own manufacture or labor are exempt. They argue that no reasonable basis for this exemption is apparent in a law manifestly designed to promote the safety of highways. The Company further claims that the Act creates an arbitrary classification which is unreasonable with reference to the purposes of the statute. In support of its position the Company cites Woolf v. Fuller, 87 N. H. 64, 72, Bliss' Petition, 63 N. H. 135; State v. Wiggin, 64 N. H. 508.

The State claims that Chapter 106 does not unduly discriminate against the respondent and cites cases supporting the power of the legislature to classify occupations for the exercise of the police power, Barbier v. Connelly, 113 U. S. 27; 28 L. Ed. 923; 5 S. Ct. 357; Mugler v. Kansas, 123 U. S. 623; 31 L. Ed. 205; 8 S. Ct. 273; Holden v. Hardy, 169 U. S. 366; 42 L. Ed. 780; 18 S. Ct. 383; State v. Guertin, 88 N. H.

The State claims that to be valid the classification of an occupation for the purpose of regulation requires only reasonable grounds of distinction. It is argued that for hire carriers can reasonably be expected to use the highways more frequently than those not in that business and that the business of transporting for hire is in effect engaging in

the business of a public utility, and cites Munn v. Ill., 94 U. S. 113; 24 L. Ed. 77. In support of its position that the business of a public utility may be the object of special regulations, it is further pointed out that the rule of equality applies to the legislative power to tax as well as to its power to enact police regulations, Williams v. State, 81 N. H. 341, and points to the fact that the legislature may establish exemptions from taxation without violating the principle of [fol. 6-15] equality, Canaan v. District, 74 N. H. 517; Keene v. Roxbury, 81 N. H. 322; Sunapee v. Lempster, 65 N. H. 655; Opinion of the Justices, 84 N. H. 559, 569; Opinion of the Justices, 88 N. H.

The State further argues that the burden of regulating private carriers may be out of proportion to the benefits expected to accrue from regulation. It argues that every possible presumption must be made in favor of the validity of the statute and that the presumption continues until the contrary is shown beyond a rational doubt, Rich v. Flanders, 39 N. H. 304; Opinion of the Justices, 77 N. H. 611, 617; Musgrove v. Parker, 84 N. H. 550; Union Pac. R. R. v. U. S., 99 U. S. 700; 25 L. Ed. 496.

Presumably the Legislature had before it a situation which it wished to correct. The chaotic condition which existed in the field of transportation for hire was public knowledge. This condition did not apply to private transportation. Private carriers were not forced to meet cut-throat competition resulting in non-compensatory rates which could only be met in the requirement of greater and longer demands on its employees. However, here again the question raised is not for our determination. We have no authority to find on the issue raised.

Violation of the Act by the Company

3. The Company claims that the evidence does not establish violation of the act by it. It cites the fact that many of its drivers are operating in interstate commerce. It argues that the State has not shown service operation in excess of 12 hours on New Hampshire highways. It claims the State has not shown that the vehicles were not under the control of two licensed operators or that such excess driving was not due to emergency. It further argues that it must appear that the Company has either required or permitted operation in excess of 12 continuous hours be-

fore a violation can be charged to the Company and claims that there is no evidence that the excessive hours of service [fol. 6-16] were required by the Company or that the Company had knowledge that its drivers were working excess hours.

As we interpret the statute, a driver who has been on duty 12 hours, even if on duty in another state for all or a greater portion of that time, violates the law if he operates on the highways of this State subsequent to the 12-hour tour of duty without a three or an eight-hour rest period. The evidence shows that drivers operate on an hourly basis of pay and further shows that long tours of duty either follow or precede relatively short days. Any claim of the Company that it had no knowledge of the hours on duty is controverted by the fact that drivers are paid on an hourly basis. In the case of Chevrette he was called to work four hours earlier than his regular period and it is ridiculous to argue in this case that the long hours were not required by the Company. Further there can be no reasonable doubt that Chevrette operated on the highways of New Hampshire after having been on duty more than 12 hours in view of the circumstances disclosed on record. As to the claim that the State failed to show that there were not two drivers on the truck, such claim is clearly in error. The record clearly shows that Chevrette was the only driver on the truck on January 11 and 26, 1937, on which days violations occurred. Incidently, his record shows that two men were on the truck January 7, 8, 9, and 27, but only one man on all other days of the month.

No emergency blanks have been filed by either the drivers or the Company. If there have been such delays, the Company has been negligent in not filing the blanks as required by the rules and should not now be heard to claim that the State has failed to show that the overtime driving did not result from emergency delays.

The State argues that the rule of procedure is well established in this State that convenience and justice may require the party not having the burden of proof to go forward with evidence when a prima facie case has been made out against it. Spilene v. Co., 79 N. H. 326; Raymond v. Co., 86 N. H. [fol. 6-17] 93, 96. In the Spilene Case the Court said at p. 328:

"In this jurisdiction procedure is what justice and convenience require. The rule in question has been criticized

chiefly upon the ground that it attempts to shift the burden of proof upon one of the issues in the case, Lisbon v. Lyman, 49 N. H. 553. But this is not a necessary result. A rule that upon an issue lying more particularly within the knowledge of one party he shall disclose his knowledge or the issue shall be decided against him, does not of necessity involve the further rule that if the evidence is produced, and the matter proves to be a disputed one, the burden is upon the party not having it generally in the trial. Justice and convenience may require that in certain phases of a case the party not having the burden of proof shall produce evidence, upon pain of that issue being decided against him if he declines to do so.

"The phrase burden of proof has been used in two very different senses. In its true sense it means the risk of non-persuasion upon the evidence in the case. But it is also used to designate the duty to go forward and produce evidence. In the first and true sense of the term the burden once fixed by the pleadings never shifts. In the secondary sense it frequently shifts during the progress of a trial. Wig. Ev., s. 2489.

"The argument against the free application of the idea that under certain circumstances the defendant should be called upon to produce evidence rests in its final analysis upon the theory that since the plaintiff makes a charge he must prove it. But this general rule is not now and never has been carried to the extreme limit of its logic. Many defences are treated as matters in confession and avoidance; and when they are pleaded, the burden is put upon the defendant in both senses. He has the duty to go forward and produce evidence and also the risk of non-persuasion. If he is sued upon a promissory note he must seasonably deny his signature or his non-action is taken as his admission of the signature. The logic of the general principle that the plaintiff should have the duty to go forward and the risk of non-persuasion has always been modified by the application of what was at the time deemed to be the common sense of the situation. It may be that many of the cases have gone too [fol. 6-18] far is this respect. It is undoubtedly true that the authorities are not harmonious, yet the essential soundness of the principle which they have sought to apply cannot be doubted."

On brief the State says:

"It appears (R. 34, 35) that the men whose hours of service records are contained in exhibits 7, 8, 9 are New Hampshire residents. Until respondent comes forward with evidence to the contrary, it is fair to infer that the excess hours of work were performed in New Hampshire. It is difficult to imagine a stronger case for the application of the rule set out above than the present one. To hold that the respondent had no duty to go forward upon the present state of facts, is to overwhelm the statute with an impossible burden of minute by minute supervision of all carriers subject to it."

Continuing the State's argument:

"Respondent's argument that in any event the wrongful acts are acts of its employees and not the acts of the corporation is a casuistry that ignores a fundamental principle of the law of corporations. If a corporation acts at all it must act through human agents. The act of the servant within the scope of his employment is the act of the master. This is true even though the servant acts in a manner contrary to the expectations of his employer. Danforth v. Fisher, 75 N. H. 111; Patenaude v. Railroad, 77 N. H. 74; Richard v. Co., 79 N. H. 380. Respondent has offered no evidence that the drivers in operating during the excess periods shown on their reports were not operating within the orbit of respondent's permission or requirements. In the absence of affirmative evidence of this character, it is unreasonable to infer that truck drivers follow their arduous tasks for more than twelve hours for fun or by preference. A clear violation of section 8 of the statute appears from the state's testimony in this case for which it is proper for the commission to revoke respondent's registration."

The fact that Osgood, Buswell and Hook had not filed Hours of Service Records though operating over routes wholly within this State conclusively shows a violation of Rule 4n, and of the orders making such rule effective.

[fol. 6-19] Commission Authority to Prescribe Rules

4. The Company challenges the authority of the Commission to make rules and regulations relating to Hours of Service. It claims that the Commission is limited to orders

to compel compliance, but is not authorized to make rules and regulations to facilitate investigation. It further claims that the rules and regulations go beyond the terms of the statute and purport to require acts not required by the statute. It further contends that the duty of filing reports and otherwise keeping Hours of Service Records is upon the drivers and not the Company. The position of the State is shown in the following quotation from its brief:

"The Commission had authority to promulgate the regulations effective August 1, 1936 by an order dated July 11, 1936. The language of the statute expressiy grants such authority. While a forthright declaration that the commission is hereby authorized to issue necessary rules and regulat-ons in connection with the enforcement of this act, does not appear, words of art are not necessary to confer the power to make rules and regulations upon an administrative body. It is abundantly clear and leaves no room for argument that the act as a whole is to be administered by the Public Service Commission. The last sentence of section 8, 'The Commission shall have authority to enforce the provisions of this section', empowers the commission to do whatever is necessary for successful enforcement including the issuance of rules and regulations. If this were not so the sentence is entirely superfluous. It would be a mere restatement of what previous sections make plain. The legislature will not be presumed to have used useless language. The express reference to orders issued under the provisions of the Act in section 12 reinforces the grant of authority in the last sentence of section 8.

"The rules and regulations promulgated do not exceed the authority granted. They are a reasonable means by which the commission can carry out its duty of enforcing the law. In State v. Normand, 76 N. H. 541, the statute forbad the existence of unclean, unhealthful or unsanitary conditions and further declared that they existed if food [fol. 6-20] in the process of production, storage, sale or distribution is unnecessarily exposed to flies, dust or dirt. A regulation adopted by the State Board of Health to the effect that bread should be wrapped in paper was held to be a reasonable regulation. In the present case the statute prohibits excessive hours of labor. A requirement that the actual hours of labor be reported is a requirement obviously calculated to produce compliance with the statute. Such

a regulation is not an unconstitutional exercise of legislative power. The commission has not assumed a power to make the law, it merely has exercised discretion in its execution. The rules and regulations that the respondent challenges are reasonable methods by which the legislative purpose can be carried out. State v. Normand, supra. See: Grafton & c. Co. v. State, 77 N. H. 490; Ferretti v. Jackson, 88 N. H. —."

We are of the opinion that we have authority to make rules, regulations and orders under Section 8 as to Hours of Service. Whether or not we have authority to make rules and regulations or orders as to other provisions of the Act is not here involved.

Conclusions

We find that the H. P. Welch Company has violated the provisions of the Laws of 1933, s. 8, c. 106. We further find that the H. P. Welch Company has violated Rule 4n of Circular No. 2 of the Commission's Rules and Regulations, and Orders Nos. 2560 and 3101.

The Commission has authority to suspend or revoke any registration certificate issued in accordance with the provisions of the Act for violation of the provisions of the Act. The penalty is a serious one as even a short suspension may result in the permanent loss of considerable patronage. Either suspension or revocation may seriously inconvenience the shipping public, at least temporarily. Under these circumstances, the authority should be exercised with caution and with sufficient notice of suspension or revocation to the public to permit of necessary adjustments to other services.

[fol. 6-21] Our order will issue suspending the registration certificates, which permit the H. P. Welch Company to lawfully transport shipments as a common and contract carrier by motor vehicle in the State of New Hampshire, for the following five days, December 27, 28, 29, 30, and 31, in the year 1937. We are at this time directing the Attorney-General to seek in the Superior Court in equity, in the name of this Commission, pursuant to Laws of 1933, c. 169, s. 2, an appropriate order restraining for the future violation of the statute and our orders issued thereunder by the H. P. Welch Company.

Smith and Barry, Commissioners, concurred.

ORDER NO. 3397

Upon consideration of the foregoing report, which is made a part hereof, it is

Ordered, that any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in motor vehicles between points within this State, either as a common carrier or contract carrier, be, and hereby are, suspended for the following five (5) days:

December 27, 1937.
December 28, 1937.
December 29, 1937.
December 30, 1937.
December 31, 1937.

By order of the Public Service Commission of New Hampshire this eleventh day of December, 1937.

James W. Doon, Secretary.

[fol. 7] IN SUPREME COURT OF NEW HAMPSHIRE

[Title omitted]

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of the State of New Hampshire:

Your petitioner, H. P. Welch Company, a corporation of the state of Massachusetts, considering itself aggrieved by the final decree of the Supreme Court of the State of New Hampshire, rendered June 7, 1938, in the above entitled cause, dismissing the petitioner's appeal from an order of the Public Service Commission of New Hampshire, hereby prays that an appeal by this petitioner be allowed to the Supreme Court of the United States herein to the end that said degree may be there reviewed, that the order of appeal operate as a supersedeas, and that an order be made fixing [fol. 8] the amount of the bond required of the petitioner herein on such appeal.

Assignment of Errors

The said petitioner assigns the following errors in the record and decree of the said Supreme Court of New Hampshire, to wit, that the said Supreme Court erred in its said decision as follows:

1. In holding that sections 3, 4 and 8 of chapter 106 as amended by chapter 169 of the New Hampshire Session Laws of 1933 do not deny to this petitioner the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

2. In holding that sections 8 and 11 of chapter 106 as amended by chapter 169 of the New Hampshire Session Laws of 1933, as applied to this petitioner while engaged in interstate commerce, were not superseded and rendered void by the enactment of section 304a of title 49 of the United States Code, commonly cited as the "Motor Carrier Act of 1935".

3. In rendering a decree dismissing this petitioner's appeal from an order of the Public Service Commission of New Hampshire suspending petitioner's common and contract [fol. 9] carrier registration because of alleged violations of section 8 of chapter 106 as amended by chapter 169 of the New Hampshire Session Laws of 1933, the said section 8 being repugnant to the Constitution and laws of the United States as above set forth.

Prayer for Reversal

For these errors the said petitioner prays that the decree of the Supreme Court of New Hampshire, in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a decree ordered in favor of the said petitioner, and for costs.

Richard F. Upton, Lawrence I. Duncan, Robert W. Upton, Attorneys for H. P. Welch Company, Petitioner and Appellant.

[fol. 10] IN SUPREME COURT OF NEW HAMPSHIRE

[Title omitted]

ORDER ALLOWING APPEAL

The Petition of H. P. Welch Company, a corporation of the State of Massachusetts and appellant in the above entitled cause, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the State of New Hampshire and the Assignment of Errors filed therewith having been considered:

It is ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of New Hampshire as prayed in said petition and that the clerk of the Supreme Court of the State of New Hampshire shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof. [fols. 11-16] The said appellant now presenting its bond in the sum of Three Hundred Dollars, executed by The Fidelity & Casualty Company of New York as surety, it is ordered that such bond be and the same is hereby approved.

It is further ordered that the appeal herein shall operate as a supersedeas and suspension of the order of the Public Service Commission.

Dated, July 14, 1938.

John E. Allen, Chief Justice of the Supreme Court of New Hampshire.

[fol. 17] IN SUPREME COURT OF NEW HAMPSHIRE

H. P. WELCH COMPANY

v.

STATE

OPINION—June 7, 1938.

Appeal, from an order of the Public Service Commission suspending for five specified days "any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in

motor vehicles between points within this State, either as a common carrier or contract carrier."

The H. P. Welch Company, for convenience hereinafter referred to as the company, is a Massachusetts corporation engaged in the business of transporting property for hire over the public highways of this and other states. In the conduct of its business it owns and operates a fleet of motor trucks, eighteen of which were registered with the Public Service Commission under Laws 1933, c. 106, s.s.2,3, as both common and contract carriers for the year 1936, and twenty of which were so registered for the year 1937. Computed on the basis of tonnage approximately 99% of its business during those years was in interstate commerce and the remaining 1% was in intrastate commerce.

On April 13, 1937, the Public Service Commission ordered the company to "show cause why its common and contract carrier certificates should not be suspended or revoked," and set May 6, 1937, as the date for hearing. This order [fol. 18] recited violations by the company of the provisions of Laws 1933, c. 106, s. 8, "by requiring or permitting a driver to operate after he has been continuously on duty for more than twelve hours." It also recited violations by the company of rule 4N of Circular No. 2 of the commission's administrative rulings "by requiring or permitting a driver to operate without a record on the vehicle of his hours of service, and by failure to file with the Commission the 'Hours of Service Record' of each driver." At the hearing held pursuant to this order the company appeared by counsel and was given full opportunity to present its evidence and its arguments.

On December 11, 1937, the Public Service Commission filed its report and the order of suspension quoted above. By stipulation the order was suspended pending the outcome of this appeal.

Such further facts as are deemed material are stated in the opinion.

Lawrence I. Duncan and Robert W. Upton (Mr. Duncan orally), for the plaintiff.

Dudley W. Orr (by brief and orally), for the State.

WOODBURY, J.:

The plaintiff does not contend that the legislature in enacting Laws 1933 c. 106, as amended by Laws 1933, c.

169, intended to impose direct regulations upon interstate commerce as such, nor does it contend that the provisions of these statutes operate either to discriminate against such commerce or to impose an undue or unreasonable burden upon it. Southern Railway Co. v. King, 217 U. S. 524. Neither does the company challenge the doctrine [fol. 19] established in Hendrick v. Maryland, 235 U. S. 610, 622, and consistently adhered to ever since, (South Carolina State Highway Dept. v. Barnwell Bros., Inc., — U. S. —, and cases cited), to the effect that "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles • • • those moving in interstate commerce as well as others." As summarized in its brief the plaintiff's appeal is "upon the ground that the statute denies to it the equal protection of the laws guaranteed by the Bill of Rights of the Constitution of New Hampshire and by the 14 Amendment to the Constitution of the United States, upon the ground that the statute and Rule 4N, as applied to interstate commerce, have been superseded by the 'Motor Carrier Act, 1935' upon the ground that Rule 4N and the orders of the Commission relating thereto exceed the powers and authority of the Commission, and upon the further grounds that the evidence does not establish the Company's responsibility for the alleged violations, and that the findings and conclusions of the Commission set forth above are unwarranted by the evidence."

The statute under consideration applies only to those transporting property for hire, either as common or contract carriers as the latter term is defined in the act, and it applies to them only in so far as they operate motor vehicles over the public highways between points within this state. It does not apply to "those transporting products of their own manufacture or labor," and, in addition, section 4 of the act specifically exempts from its provisions [fol. 20] "motor vehicles not principally engaged in the transportation of property for hire," and "motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten mile limit on occasional trips, not exceeding two trips in any thirty-day period."

The company contends "that these exceptions and exemptions are discriminatory, and deny to it the equal protection of the laws guaranteed by the Constitution of New Hampshire and the Fourteenth Amendment to the Constitution of the United States."

Under Part I of the constitution of this state and under the fourteenth amendment to the constitution of the United States persons similarly situated are guaranteed similarity of treatment. In this respect the fourteenth amendment "adds nothing to the rights and liberties of the citizens of this state," (State v. Pennoyer, 65 N. H. 113, 115), "for our constitution secures to every person within its jurisdiction all the rights guaranteed to citizens of the United States by that amendment." State v. Aldrich, 70 N. H. 391. Not every legislative classification is within the ban of these constitutional limitations however. "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." Barbier v. Connolly, 113 U. S. 27, 32; Or, as stated in Opinion of the Justices, 85 N. H. 562, 564, "Classification to be valid must reasonably promote some proper object of public welfare or interest and may [fol. 21] not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature." Legislative classification to be constitutional must be based upon some substantial foundation, it may not be arbitrary, it must be germane to the purpose of the law. Woolf v. Fuller, 87 N. H. 64, 72, 73.

Recent decisions of the Supreme Court of the United States sustain the validity under the fourteenth amendment of classifications substantially similar to those made in the statute under consideration. Under these decisions a state, in the interest of highway safety, may not only single out carriers for hire by motor vehicle from such carriers in general and apply to the former regulations from which the latter are exempt, but it may also create classifications among carriers for hire based upon the nature and extent of their use of the highways. Packard v. Banton, 264 U. S. 140; Bekins Van Lines, Inc. v. Riley, 280 U. S. 80; Alward v. Johnson, 282 U. S. 509; Continental Baking Co. v. Woodring, 286 U. S. 352; Sproles v. Binford, 286 U. S. 374; Hicklin v. Coney, 290 U. S. 169.

In the Continental Baking Company case the court said, page 373, "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the class of operations, which by reason of their habitual and constant use of the highways, brought about the conditions making regulation imperative." And, in Sproles v. Binford, supra, the court said: "There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. The State is not [fol. 22] bound to cover the whole field of possible abuses. The question is whether the classification adopted lacks a rational basis."

These decisions establish that classifications of the sort here under consideration do not lack a "rational basis", and they are conclusive upon us on the question of the validity of Laws 1933, c. 106, under the fourteenth amendment to the federal constitution. In addition these decisions "are authority to be weighed" on the question of the validity of that statute under the constitution of this state. State v. Pennoyer, 65 N. H. 113, 115.

One of the expressed and evident purposes of the statute before us is to protect the users of the highways of this state from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue. Undoubtedly this is a legitimate exercise of the state's police power, and, while it is true that a fatigued truck-driver transporting goods manufactured by him or his employer is as great a menace upon the highway as such a driver transporting property for hire, it does not follow that in the interest of highway safety no distinction may be drawn between them on the basis of the industry in which they are engaged. The legislature may well have been in the possession of facts indicating a practice on the part of carriers for hire to employ their drivers for long hours, while it may also have had before it evidence that such was not the practice among the owners of trucks used for other purposes. We may take judicial notice of the fact that trucks not used by common or contract carriers create a substantial amount of traffic over the highways but we cannot take judicial notice [fol. 23] of the conditions of employment in those industries. In other words, instances of the employment of truck-drivers for excessive hours may occur only sporadically and

then under circumstances of emergency in industries of this latter sort, while excessive hours of service may be a regular practice in the business of transporting goods for hire. At least, upon the basis of facts judicially known, we cannot say that the existence of such a situation could not have been found by the legislature, and under these circumstances its classification must be allowed to stand. South Carolina State Highway Dept. v. Barnwell Bros., Inc. — U. S. —.

Similar considerations support the exemption from the provisions of the act of "motor vehicles not principally engaged in the transportation of property for hire." Excessive hours of employment on vehicles so used may either be of such infrequent occurrence that regulation of them is unnecessary, or else it may have been the legislative judgment that regulations adequate to control persons regularly engaged in the business of common and contract carriers for hire by motor truck would bear upon persons not regularly so engaged with a weight disproportionate to any possible benefit which might thereby accrue to the public. Whether, under our constitution, frequency and extent of operation may alone provide a sufficient basis for classification we do not undertake to say, but they may properly be supporting reasons therefor when, as here, some other reason appears in conjunction with them.

In the case of local operations, in which from necessity the periods of driving must be frequently interrupted, it may well be that fatigue does not develop as rapidly or [fol. 24] become as great as it does in a driver subjected to the monotony incident to long and uninterrupted trips. For this reason the legislature may reasonably have decided that local operations did not require any regulation at all while regulation was imperative as to operations covering greater distances.

We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a "rational basis," or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional.

The case principally relied upon by the company, (Smith v. Cahoon, 283 U. S. 553), is not in point. In that case the court was called upon to consider a state statute purporting to regulate carriers of property for hire by motor trucks in the interest of highway safety which excluded from its

operation motor vehicles used to transport agricultural and dairy products and fish and oysters. In holding this classification arbitrary, without relation to the purpose of the act and hence unconstitutional, the court said: "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The distinction between the case cited and the one at bar is obvious. In the former, classification is based upon the kind of goods carried, and that without relation to the nature of those goods as inflammable, explosive, bulky or [fol. 25] otherwise likely to create a hazard when in transit over the highway. In the case before us, on the other hand, the classification is upon the basis of the nature of the business of the owner of the vehicle and, as appears above, a classification upon this basis is not necessarily an arbitrary or unreasonable one. The above distinction between the Smith case and cases similar to the one before us was fully elaborated in Aero Mayflower Tea Co. v. Georgia Public Service Commission, 295 U. S. 285.

The company's next contention is to the effect that the state statute has been superseded by the federal Motor Carrier Act, 1935. 49 Stat. 543.

Briefly stated the record of events is as follows: The state statute under consideration became law on May 6, 1933. The administrative rulings, Circular No. 2, referred to above became effective on August 1, 1936. The violations thereof and of the statute for which the company's registration certificates were suspended occurred during the latter part of 1936 and the first three months of 1937.

The federal Motor Carrier Act, 1935, became law in August 1935, and in that act, s. 204 (a) (2), it is provided that the Interstate Commerce Commission "may establish reasonable requirements with respect to * * * maximum hours of service of employees." Pursuant to this permissive power that commission held hearings at various places during the year 1937, and on December 29 of that year rendered its decision. In this decision it established maximum hours of service for employees of both common and contract carriers for hire by motor vehicle which are substantially similar to those established in Laws 1933 c.

106, s. 8, and in addition it provided for the keeping and [fol. 26] filing of records of service by such employees which are also substantially similar to the provisions of rule 4N mentioned above. By order of the Interstate Commerce Commission its requirements in the above respects were not to become effective until July 1, 1938.

The violations of the state act for which the company was put upon trial occurred, therefore, during the interval between the passage of the federal act and action thereunder by the Interstate Commerce Commission. The question presented is whether or not, during that time, the operation of the state statute, as it affected interstate commerce, was suspended by the federal act.

Generally stated the rule is that reasonable nondiscriminatory state action under the police power may indirectly affect interstate commerce, but it may affect such commerce only until Congress in the exercise of its plenary power takes action which covers the field. Oregon etc. Co. v. Washington, 270 U. S. 87. Both the state and the federal government cannot occupy the same field at the same time, (University Overland Express Co. v. Griffin, ante, and cases cited), and the time when Congress preempts the field depends upon its intention.

Applying this rule of Congressional intention the Supreme Court of the United States in Northern Pacific Railway v. Washington, 222 U. S. 370, and Erie Railroad Co. v. New York, 233 U. S. 671, held that state regulations of the hours of service of train crews, in so far as they applied to employees upon trains moving in interstate commerce, were suspended upon the date of passage of a federal statute upon the subject. This federal statute was passed on March 4, 1907, but by its terms it was not to take effect until one [fol. 27] year later. In holding that the state statutes were ineffective as to interstate commerce during that year the court said that Congress had manifested its intention to enter the field when it enacted the statue and that by postponing its effective date for a year it manifested an intention that the field should remain without regulation during that time.

The above cases are strongly relied upon by the company but we do not consider them to be in point. The reason for this is that the Hours of Service Act, (34 Stat. 1415), differs radically from the Motor Carrier Act, 1935. In the former Congress established the maximum hours of service per-

mitted and provided that the act should become operative one year from the date of its passage. In the latter Congress gave the Interstate Commerce Commission permission to fix the maximum hours of service and provided no date upon which the commission was required to put its rulings into effect. The cases establish that this difference is a material one.

In Missouri Pacific Railway Co. v. Larabee Mills Co., 211 U. S. 612, 623, it is said that "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens." In Northwestern Bell Tel. Co. v. Nebraska State Railway Commission, 297, U. S. 471, it was held that state regulations in respect to depreciation rates for property used by a telephone company in interstate commerce were not suspended by a federal statute giving the Interstate Commerce Commission authority to [fol. 28] prescribe such rates "as soon as practicable." The court said, page 478, "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates." See also Smith v. Ill. Bell Tel. Co., 282 U. S. 133.

Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truck-drivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject. Whether that date was December 29, 1937, when those rulings were made, or whether it will not be until July 1, 1938, when they will go into effect, is a question not presented in the case at bar and one upon which we express no opinion. The violations of the state act charged against the company occurred before either of those dates and so at a time when the state act was in full force and effect. This same result has been reached as to other similar regulatory features of the Motor Carrier Act, 1935. L. & L. Freight Lines, Inc. v. Railroad

Commission of Florida, 17 F. Supp. 13; Werner Transportation Co. v. Hughes, 19 F. Supp. 425.

The company further contends that the commission is without statutory authority to promulgate rules and regula- [fol. 29] tions for the enforcement of the act and that in consequence it cannot be punished for failure to conform to the provisions of rule 4N of Circular No. 2 of the Administrative Rulings referred to above.

The act does not in terms give the Public Service Commission authority to prescribe rules and regulations for the carriers to which it applies. A study of the act as a whole, however, makes it abundantly clear that the legislature intended to commit the enforcement of its provisions to the commission. In addition, the section of the act which limits hours of service, (s. 8), specifically provides that "The commission shall have authority to enforce the provisions of this section," and section 12 provides a punishment by fine for "violating the orders of the commission issued under the provisions of this act." These provisions taken together and considered in the light of the general scheme of the statute and the rule making power given to the commission in other phases of its activities, lead to the conclusion that although the commission is "an agency of limited powers and authority," (Petition of Boston & Maine Railroad, 82 N. H. 116) it was the legislative intention that the commission should enforce the provisions of this statute in the same way that it enforced its supervisory authority in other respects, i. e. by the promulgation of appropriate rules and regulations.

To construe the sentence quoted from section 8 otherwise than as above would be to hold that it gives to the commission only such powers of enforcement as are given by the general law to police officers. To say the least it seems unlikely that such was the intention of the legislature.

[fol. 30] Rule 4N, after paraphrasing the provisions of section 8 of the statute, requires that each driver shall keep with him while on duty a record of his hours of service on forms prescribed by the commission, and that copies of such records shall be kept by his employer. It also provides that these records shall be filed with the commission at the end of each month. These rules do not attempt to establish any broad "policy and standard for action," (Ferretti v. Jackson, 88 N. H. 296, 304; Opinion of the Justices, 88 N. H. 497), and so do not amount to an unconstitutional usurpation of

legislative power by the commission. The rules are well calculated to aid the commission in the enforcement of the act and are valid exercise by the commission of the powers given to it by the statute.

The company's next contention is that the Public Service Commission exceeded its statutory authority in suspending the company's registration certificates for violation of the commission's administrative rules. A sufficient answer to this contention is that it does not appear that the commission's order of suspension was based upon such violations rather than upon a violation of the statute itself.

The statute, (s. 11), gives the commission authority to suspended certificates of registration for violations of the provisions of the act. Section 12 as amended by Laws 1933, c. 169, s. 2, imposes a fine of not more than one hundred dollars for violation of "the provisions of this act or the orders of the commission issued under the provisions of this act." We need not consider the question of the power of the commission to punish under this latter section because it has [fol. 31] imposed no fine. Instead it has suspended the company's certificates of registration. This is one of the punishments prescribed by the act for its violation and authority to suspend was clearly granted to the commission. Suspension of registration certificates is not a punishment provided for violation of the rules of the commission, and while there is evidence that the plaintiff had violated both the act and the administrative orders, there is nothing to show that the commission based its order of suspension upon a violation of the latter rather upon a violation of the former. To assume without evidence that it had disobeyed the statute by imposing the suspension for a violation of its orders rather than for a violation of the act would be to assume that the commission had disregarded the clear wording of the statute. This is an assumption we are not compelled to make.

It is established law in this jurisdiction that, in the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it. Spaulding v. Mayo, 81 N. H. 85; Bean v. Quirin, 87 N. H. 343, 350, and cases cited. We see no reason why this principle applicable to the findings of inferior courts is not also applicable to the Public Service Commission when acting judicially, and, applying it to the order of the commission before us, we conclude that the suspension of registration

which the commission imposed upon the company was for the violation by it of the provisions of the statute and that its violations of the administrative orders were either not found or were permitted to pass without punishment.

[fol. 32] The evidence before the commission of the company's violation of the statute by requiring or permitting its drivers to operate its trucks for illegally excessive hours was in the form of reports filed under the provisions of rule 4N by a few of the drivers. The company does not, nor may it, complain of the informality with which this evidence was presented. P. L. c. 238, s. 10; State v. New Hampshire Gas & Electric Co., 86 N. H. 16, 31. Its complaint is that this evidence provides an insufficient basis for the order of suspension for the reason that it does not show that the company "required or permitted" its drivers to operate for excessive hours; that it does not show that driving in excess of the statutory limits occurred in New Hampshire rather than in other states in which the drivers served; and that it fails to reveal that such excess hours of operation did not occur under circumstances of emergency or upon a truck under the control of two licensed operators.

The evidence contained in the reports on file with the commission show not only periods of employment for longer hours than the statute permits, but they also show repeated instances of such excessive hours and the oral testimony given before the commission by the company's local manager showed that the drivers were paid on an hourly basis. Under these circumstances it would be little short of preposterous to say that the company had no knowledge of the hours of its drivers' employment. It would be equally preposterous to find that the drivers when operating over the statutory limits were acting outside the scope of their employment; that they were engaged upon a frolic of their [fol. 33] own. The obvious inference from the testimony is that the company not only permitted but also even arranged its trips so as to require that its drivers serve beyond the statutory limit of hours of service.

Proof that some of the company's drivers operated for hours in excess of statutory limit in this state is contained in the inferences which may be drawn from their reports. These reports indicate that some of the drivers lived in Manchester and that their tours of duty after excessive hours of operation ended there. Obviously to have completed such a period of service within this state they must

of necessity have operated illegally within its borders. The fact that some of the hours of service which went to make up the statutory limit occurred outside the state is not material. There is no violation of the statute until an operator has reached the limit of hours of operation allowed. The offense consists in operating thereafter, and such violation could findably have occurred within the state.

The other respects noted above in which it is claimed that the evidence is deficient relate to matters peculiarly within the company's knowledge. If such facts existed it was the province of the company to offer evidence of their existence, (State v. Foster, 23 N. H. 348; State v. Lapointe, 81 N. H. 227; State v. Bozek, 81 N. H. 277), and full opportunity was given to it to do so.

Since the days specified for the suspension of the company's certificates have passed, the commission may amend its order by specifying other days upon which its order of suspension shall be operative.

Appeal dismissed.

All concurred.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed September 1, 1938

Comes now, H. P. Welch Company, appellant in the above entitled cause, and states that the points upon which it intends to rely in this court in this case are as follows:

1. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding that sections 3, 4 and 8 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933 do not deny to this appellant the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding [fol. 36] that sections 8 and 11 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933, as applied to this appellant's operations in interstate commerce, were not superseded, and rendered void by the enactment of section 304a of title 49 of the United States Code.

The appellant further states that the following parts of the record, as filed in this court, are necessary to be printed for the consideration of the points set forth above.

1. Agreed summary of proceedings.
2. Report of Public Service Commission and order.
3. Opinion of the Supreme Court of New Hampshire and order.
4. Docket entries in the Supreme Court of New Hampshire.
5. Petition for appeal to the Supreme Court of the United States and assignment of errors.
6. Order allowing appeal.

Respectfully submitted, Robert W. Upton, Counsel for Appellant.

Dated August 31, 1938.

The appellee, The State of New Hampshire, hereby acknowledges service of the foregoing statement and agrees that the parts of the records designated by the appellant shall constitute the record on appeal.

Dudley W. Orr, Counsel for Appellee.

Dated August 31, 1938.

[fol. 37] [File endorsement omitted.]

Endorsed on cover: Enter; Robert W. Upton. File No. 42,780. New Hampshire Supreme Court. Term No. 295. H. P. Welch Company, appellant, vs. The State of New Hampshire. Filed August 22, 1938. Term No. 295, O. T., 1938.